

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 221 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? No

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? : NO
No

THE ASST.CIT,

Versus

THERMOTECH ENGINEERS

Appearance:

MR MANISH R BHATT for Petitioner

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE P.B.MAJMUDAR

Date of decision: 13/10/1999

ORAL JUDGEMENT(Per:Patel.J)

#. Being aggrieved by an order dated 27.1.1999 made by
the Income-tax Appellate Tribunal, Ahmedabad (hereinafter
referred to as "the Tribunal") the Assistant Commissioner
of Income-tax Circle 10(1), Ahmedabad has preferred this
appeal under section 260A of the Income-tax Act

(hereinafter referred to as the Act). It appears that the Assessing Officer assessed the assessee for A.Y. 1992-93, under section 143(3) of the Act and computed the income of the assessee. The said order is annexed with the appeal at Annexure "A".

#. It appears that the Commissioner of Income-tax (hereinafter referred to as "CIT") passed an order under section 263 of the Act. It appears that the CIT was of the view that the Assessing Officer has failed to initiate penalty proceedings under section 271(1)(c) of the Act. In para 12 of the order the CIT expressed the opinion that on the facts of the case the Assessing Officer should have initiated penalty proceedings under section 271(1)(c) of the Act which he failed to do and issued the direction to the Assessing Officer to reframe the assessment and initiate the penalty proceedings under section 271(1)(c) of the Act. It appears that the assessee being aggrieved by the order passed by the CIT under section 263 of the Act preferred an appeal before the Tribunal. The Tribunal after considering the decisions on the question set aside the order passed by the CIT. The Tribunal considered the decisions of the different High Courts as well as the decisions rendered by the Tribunal; some in favour of the assessee and some in favour of the Revenue. The Tribunal expressed an opinion that when two views are possible, the construction which favours the assessee should be taken as laid down by the Supreme Court. The Tribunal considered the cases reported at 60 ITR 392, 77 ITR 817 and 88 ITR 192.

#. Before us the learned advocate for the Revenue submitted that passing an order under section 271 of the Act is an order which can be said to be the part of the assessment order. He submitted that as the Assessing Officer failed in passing appropriate assessment order in accordance with law, the CIT was justified in exercising the powers under section 263 of the Act.

#. Mr. Naik learned counsel for the revenue submitted that Madhya Pradesh High Court in the case of Addl. Commissioner of Income-tax M.P. vs. Indian Pharmaceuticals reported in 123 ITR 874 has taken the view that under section 263 of the Act, the CIT was justified in passing the order imposing penalty. In that case the Income-tax Officer (hereinafter referred to as ITO) completed the assessment for the Assessment Years 1967-68 and 1968-69 determining the assessable income at Rs.59,118 and Rs. 1,08,044/-. The Additional

Commissioner set aside both these orders exercising jurisdiction under section 263 of the Act on the ground that the assessee neither paid any tax on self-assessment basis nor filed any estimate nor paid any advance tax in terms of section 212(3) of the Act. The ITO completed the assessments without issuing any penalty notice under section 273(b) of the Act. Neither notices were issued for delay in submitting these returns nor any penalty was levied in terms of Section 271(1)(a) of the Act. The (CIT), therefore, felt that prima-facie the orders passed by the ITO were erroneous and prejudicial to the interests of the revenue. The order was carried in appeal before the Tribunal which came to the conclusion that the assessment orders were not erroneous and the Additional Commissioner had no jurisdiction to revise them under section 263 of the Act. The Tribunal further held that exercise of jurisdiction by the Additional Commissioner under section 263 of the Act was bad in law and the orders of the Additional Commissioner were, therefore, set aside except the order with respect to interest. At the request of the Additional Commissioner, the Tribunal referred the questions to the High Court. The Division Bench of the High Court was of the view that the word "assessment" is not used in the Act in the narrow sense of computing income only but is used in a wider perspective and, therefore, when proceedings for assessment are pending before the ITO, if facts attracting the provisions of section 271(1)(a) comes to his notice while proceeding with the assessment, it is necessary for the ITO to invoke the provisions for the recovery of penalty. The Division Bench was of the view that, the word "assessment" is not to be considered in a narrow sense but all other relevant aspects are required to be considered at the time of computation of income. The Division Bench held that during the assessment proceeding, if the ITO failed to take notice of the facts attracting the provisions contained in section 271(1)(a) of the Act, it could not be said that his failure to take notice of the facts which were before him attracting the provisions of Section 271(1)(a) of the Act does not amount to an error prejudicial to the interests of the revenue. Ultimately the Division Bench held that the CIT was justified in exercising jurisdiction under section 263 of the Act. Mr.. Naik learned counsel for the revenue submitted that the Division Bench has considered the Apex Court decision and therefore, the view expressed by the Tribunal in the instant is erroneous and contrary to law and therefore, requires to be interfered with.

#. In the case of Commissioner of Income-tax vs.

Sudershan Talkies reported in 201 ITR 289, the Division Bench of Delhi High Court considered the facts where the CIT while exercising jurisdiction under section 263 of the Act set aside the order and directed the ITO to charge interest under section 217 of the Act and also to initiate penalty proceedings under section 273(b) of the Act. The Tribunal set aside the order. The court while deciding in favour of the assessee upheld the view expressed by the Tribunal relying on its earlier decision reported in the case of Add. Commissioner of Income-tax vs. Sudershan Talkies reported in 200 ITR 153. The court considered the question whether failure to initiate penalty proceedings would give any jurisdiction to the CIT to pass an order under section 263 of the Act and directing initiation of penalty proceedings by ITO for the Assessment Years 1967-68, 1968-69 and 1969-70. The assessee had not complied with the provisions requiring the payment of advance tax at the time when the assessment orders were made. The ITO while making the assessment orders did not charge any interest under section 217 of the Act. There was neither separate order regarding initiation of penalty proceedings under section 273 of the Act nor even a reference in the order. The CIT set aside the orders and directed the ITO to make fresh assessment according to law. The CIT after taking into consideration the assessee's reply held that the orders passed by the ITO were prejudicial to the interest of the revenue and were erroneous inasmuch as the said order did not contain any direction for charging of any penal interest under section 217 of the Act and secondly, the ITO did not initiate any proceeding under section 273(1)(b) for the default in not complying with the provisions of section 209A of the Act. On appeal, the Tribunal came to the conclusion that there was no justification for the CIT to exercise his jurisdiction under section 263 of the Act and to direct the ITO to initiate proceedings for imposition of penalty under section 273(b) of the Act.

#. Learned counsel for the Revenue submitted that word "assessment" should be interpreted widely so as to include penalty. He submitted that order imposing penalty must form part of the assessment order. Non-imposing penalty is thus must be held to be included.

Chapter XIV of the Act deals with procedure for assessment. So far as penalties which are to be imposed are concerned, fall in Chapter XXI of the Act. Section 274 of the Act falling in Chapter XXI of the Act prescribes the procedure for penalty, which contemplates

an inquiry which must be fair and judicial . Imposition of penalty without reasonable opportunity of hearing would be bad. Penalty proceedings are thus distinct from the assessment proceedings.

Section 263(1) of the Act reads as under:

"263(1) The Commissioner may call for and examine the record of any proceedings under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

Thus reading of the aforesaid provisions, it becomes clear that there must be an order passed by the Assessing Officer which the CIT considers to be erroneous. It is under these circumstances that he may call for and examine the record of any proceedings under this Act. There must be existence of an order for exercising powers. We are of the view that if the order is passed, only then, the CIT will have an opportunity to consider that order and to say that the said order is erroneous. In the absence of any order, there is no question of considering and saying that the order is erroneous. Non passing of the order cannot be included as passing of an order.

#. The Division Bench of Delhi High Court in the case of Addl.CIT (Supra) considered the identical situation. It was submitted before the court by the revenue that as the ITO had failed to initiate proceedings under section 273 of the Act, it can be said to be an action prejudicial to the interest of the revenue and therefore, the CIT was fully justified in taking recourse to the provisions of section 263. Learned counsel for the assessee relied upon the decision in the case of Addl.CIT vs. Indian Pharmaceuticals 123 ITR 874. Learned counsel has also placed reliance upon the case of Addl. CIT vs. J.K., Decosta {1982} 133 ITR 7 wherein also similar question was examined by the Court. In the later case proceedings were not initiated for levy of penalty by the ITO and the Commissioner had, in that case, passed an order under section 263 of the Act directing the ITO to

initiate proceedings for the levy of penalty. Similar is the case before us. The Division Bench in that case came to the conclusion that proceedings for the levy of penalty whether under section 271(1)(a) or section 273(b) are proceedings independent of, and separate from, the assessment proceedings. The Court then came to the conclusion that failure to initiate penalty proceedings would not give jurisdiction to the CIT to pass an order under section 263 of the Act, directing initiation of penalty proceedings. The Court has pointed out that after this point was decided in favour of the assessee, the CIT, filed Special Leave Petition(Civil) No.11391-11392 of 1981 and the same was dismissed by the Supreme Court on March 2,1984. The Division Bench of Delhi High Court has observed as under:

"It is clear, therefore, that the Division Bench decision of this court in J.K.D'Costa's case {1982} 133 ITR 7 has been confirmed by the Supreme Court and the facts of that case are similar to the facts of the present case. It must follow, therefore, that the Tribunal was right in setting aside the order of the Commissioner of Income-tax passed under section 263 of the Act in so far as it directed the Income-tax Officer to initiate penalty proceedings under section 273(b) of the Act"

In para 6 we have expressed our views that penalty proceedings are distinct from the assessment proceedings. We are in agreement with the views expressed by Delhi High Court in the case of Addl. CIT vs. J.K. De Costa (133 ITR 7) and Addl.CIT vs. Sudarshan Talkies (200 STR 153) that penalty proceedings are independent of and separate from the assessment proceedings.

#. The Tribunal has followed the decision of the High Court. We have indicated two decision in details and when the Tribunal after considering the decisions and facts of the case, has decided the matter. In the facts and circumstances of the case, we are in agreement with the views expressed by the Tribunal and the appeal is required to be dismissed.